

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 14-0015

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Plaintiffs and Appellants,

vs.

ATLANTIC RICHFIELD COMPANY,

Defendant and Appellee.

*On Appeal from Montana Second Judicial District Court, Silver Bow County
Cause No. Dv-08-173 BN
Hon. Bradley G. Newman, District Court Judge*

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REPLY

ARCO's Response is, in large part, argument and equivocation regarding contested issues that should be resolved by a jury. In essence, the parties disagree regarding whether removing enormous quantities of arsenic and other heavy metals from Plaintiffs' properties is reasonable, and whether the Plaintiffs knew enough about the contamination to disregard misrepresentations by ARCO regarding the condition of the Plaintiffs' properties.

Reasonable minds can differ regarding the reasonableness of abating ARCO's contamination and whether Plaintiffs should have known their properties were contaminated where ARCO has misrepresented the condition of their properties for years. Even in this litigation, ARCO represents that smelting activities caused no arsenic pollution on Plaintiffs' properties. It is inappropriate to adopt ARCO's version of the disputed facts and terminate Plaintiffs' lawsuit through summary judgment.

I. GENUINE ISSUES OF FACT EXIST.

Numerous genuine issues of fact exist that preclude summary judgment. All inferences must be drawn in favor of the Plaintiffs. *Sands v. Town of West Yellowstone*, 2007 MT 110, ¶ 17, 337 Mont. 209, 158 P.3d 432. Whether contamination by toxic waste is a permanent or continuing injury is ordinarily a question of fact turning on the nature and extent of the contamination. *See*,

e.g., Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1075–1077

(M.D.Pa.1988); *Merry v. Westinghouse Elec. Corp.* 684 F.Supp. 852, 855–856

(M.D.Pa.1988).

A. Whether Abatement Is Reasonable.

ARCO contends removing the arsenic and other heavy metals on Plaintiffs' properties is unreasonable. ARCO Br. at 30. Contrary to ARCO's assertion, genuine issues of fact exist after taking into account all factors that the jury must consider, including: 1) whether abatement can "be accomplished without unreasonable hardship or expense," 2) the type of property affected, 3) the severity of contamination, and 4) the length of time necessary to remediate the pollution. *Burley v. Burlington Northern & Santa Fe Ry. Co.*, 2012 MT 28, ¶¶ 82, 89, 364 Mont. 77, 273 P.3d 825. The jury could find in favor of Plaintiffs on every factor.

1) Abatement Can Be Accomplished Without Unreasonable Hardship or Expense.

Based on ARCO's agreement to allow soil disposal in its local waste repository between Opportunity and Anaconda, clean-up of Plaintiffs' properties would cost up to \$37 million. (App. 10:656-657; App. 4:226-245). Unsurprisingly, if ARCO refused to allow soil disposal locally, the cost would increase due to transportation costs. (App. 2:75; App. 4:230).

ARCO's 2012 assets totaled over \$16.23 billion. While ARCO argues its wealth is not admissible at trial, it has waived this argument by contending abatement is not reasonable due to cost. Certainly a jury could determine remediation is not an unreasonable hardship upon ARCO in light of its wealth. ARCO does not dispute that clean-up can be accomplished, by technically feasible means, for .22% of ARCO's assets. Whether the hardship or expense is unreasonable is a question of fact which defeats summary judgment.

2) The Type of Property Affected.

The property at issue is private residential property, along with a few family business properties. Plaintiffs have personal reasons to seek remediation. This Court has acknowledged that the *only* remedy that affords private landowners full compensation for the contamination of their property is restoration damages. *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 34, 338 Mont. 259, 165 P.3d 1079.

ARCO contends that 78% of the land to be remediated is non-residential. ARCO Br. at 33. While ARCO's expert opines that some of the Plaintiffs' properties are "tenant" occupied, ARCO fails to acknowledge that many of those Plaintiffs are renting the properties to close family members, often with no money exchanged. *See e.g.* AR –App-0566-567 (Myers Depo. (daughter lives at property))

Raasakka Depo. (elderly father lives at property) Sevalstad Depo. (son lives at property)).

Plaintiffs intend to keep even those properties where they do not live and have personal reasons to remediate the properties, many of which have been in their families for years. Pl.s' Resp. to MSJ, Ex. 1 (CR 239). ARCO may not prevail on summary judgment simply by making a unilateral determination that the Plaintiffs' personal reasons for seeking restoration damages are insufficient. *See Lampi v. Speed*, 2011 MT 231, ¶¶ 30-31, 362 Mont. 122, 261 P.3d 1000.

3) The Severity of Contamination.

A jury could determine that the contamination on Plaintiffs' properties is severe. According to ARCO's own testing, the average level of arsenic on the surface of Plaintiffs' properties is 110.5 ppm. (App. 4:238; App. 2:63-75). ARCO does not dispute that the default cleanup level for the State of Montana is 40 ppm¹ or that "prolonged arsenic exposure causes skin and lung cancer and may cause other cancers as well." (App. 6:415-416).

ARCO takes certain statements from Plaintiffs' expert toxicologist, Dr. Rick Pleus, out of context in an attempt to persuade this Court that Plaintiffs are not

¹ The Montana DEQ's default cleanup level is addressed in more detail below. Plaintiffs do not rely on the DEQ default cleanup to establish the level to which the Plaintiffs' properties should be remediated. It is evidence, however, that the contamination is severe and that ARCO's refusal to cleanup property is unreasonable.

exposed to an unacceptable risk of cancer. However, ARCO does not, and cannot, contend that its selective quoting of Plaintiffs' expert renders him unable to testify. Dr. Pleus's credentials or ability to testify are not questioned.

While ARCO points to a few snippets of testimony, this Court has previously determined:

Regarding [an expert's] word choice, we must not let scrutiny of an expert's phrasing cloud the substantive appraisal of their testimony. It is well-noted that doctors are not lawyers and imposing strict legal terminology requirements improperly places form over substance. We have previously found that "the probative force of the opinion 'is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.' "

Beehler v. Eastern Radiological Associates, 2012 MT 260, ¶ 37, 367 Mont. 21, 289 P.3d 131 (internal citations omitted).

Here, Dr. Pleus considered the question of acceptable cancer risk. (App: 79-157). He recommended restoring the Plaintiffs' properties to background level to address the unreasonable cancer risk. (App: 137). Dr. Pleus analyzed ARCO's adoption of the 250 ppm standard and opined, unambiguously, that it posed an unacceptable cancer risk. (App: 137). Plaintiffs' qualified expert testimony raises a question of fact regarding whether the contamination is severe.

As additional proof of severity, the MDEQ default arsenic clean-up level is 40 ppm. ARCO contends that "contrary to Plaintiffs' assertion – the 40ppm default is *not* based on a determination of cancer risk." ARCO Br. at 8 (emphasis same).

However, the Montana Department of Environmental Quality (“MDEQ”) does discuss the risk of cancer posed by arsenic as the basis for the clean-up level. The MDEQ states in section 3.0 that “Since DEQ requires that cumulative facility [cancer] risks not exceed 1×10^{-5} , the PRGs (Preliminary Remediation Goals) represent protective concentrations even if as many as ten carcinogens are present at a facility at the PRGs.” (AR-App-0455).

In this case, the 250 ppm action level advocated by ARCO is based on a cancer risk of 8×10^{-5} . (AR-App-0698). ARCO’s proposed remedy allows for a risk of cancer eight times greater than that allowed by Montana and 80 times higher than the EPA’s acceptable cancer risk. (AR-App-0455.²)

Furthermore, Montana law does not limit property owners’ recourse for nuisance or trespass to cases in which there is a health threat. Rather, property owners may recover restoration damages regardless of whether the substances exceed health-based regulatory standards. *Sunburst*, ¶59. ARCO’s response fails to even address the *Sunburst* holding, recognizing property owners’ common law right to restoration damages in the absence of a health threat. The presence of pollution is actionable harm to property. *Sunburst*, ¶59. Thus, when evaluating the

² ARCO also claims that the upper limit of the range of arsenic concentrations found in native soil is 187 ppm. (AR-App-0455). However, that concentration was actually found within copper mines in the mountains. Nevertheless, According to ARCO’s pre-litigation conclusion and the EPA, the background level of arsenic in soil in Opportunity is 6-16 ppm. ARCO’s MSJ Reply (App. 8:618-619).

severity of the pollution, the Court, and ultimately the jury, must consider its impact to the property independent of the pollution's impact on the Plaintiffs' health.

4) The Length of Time Necessary to Remediate the Pollution.

There is no material dispute that it will take approximately 20 months to remediate Plaintiffs' properties. (App. 2:73). ARCO argues that this fact demonstrates unreasonableness, while Plaintiffs contend it is relatively fast. Whether twenty months is a reasonable timeframe to remove carcinogens from the Plaintiffs' properties is a question for the jury.

In sum, numerous genuine issues of fact exist regarding whether abatement is reasonable which preclude summary judgment. This case is hardly novel, as reasonableness of abatability "generally presents a question of fact for the trier of fact to weigh the evidence and judge the credibility of the witnesses." *Burley*, ¶ 91.

B. The Number of Plaintiffs' Properties That Exceed the Level of Pollution ARCO Admits is Unsafe.

A genuine issue of fact exists regarding the number of Plaintiffs' properties where, even ARCO admits, the residents are exposed to an unacceptable risk of cancer. ARCO claims that only nine of the Plaintiffs' properties contain arsenic at unsafe levels. ARCO Br. at 8-9. However, ARCO also agrees that soil samples from an additional 32 properties tested in excess of the 250 ppm threshold, which ARCO admits renders the properties unsafe. ARCO Br. at 9. To avoid this

problem, ARCO argues that because the “weighted average” of the pollution in 32 of the properties is below 250 ppm, those properties are not “unsafe.” ARCO Br. at 9. ARCO’s argument ignores the size of the Plaintiffs’ properties. (AR-App-0091-96). To remain safe under ARCO’s analysis, the Plaintiffs would need to avoid portions of their yards.

Whether these 32 Plaintiffs are entitled to restoration of their land where ARCO contends only a portion is contaminated to an unsafe level should be left to the jury. ARCO’s “area-weighted” argument may satisfy the EPA, however it is clearly not dispositive in a civil case. *Sunburst*, ¶ 80 (A polluter’s attempts to comply with state or federal regulations regarding pollution are not relevant to a landowner’s claims to be made whole under the common law.) In fact, the EPA’s acceptance of the area-weighted analysis is not even admissible. *Sunburst*, ¶ 80.

C. Whether the Pollution is Migrating.³

ARCO argues that Plaintiffs did not offer evidence demonstrating migration. ARCO Br. at 27. To the contrary, Plaintiffs’ expert, John Kane (witness disclosure in the record (App. 2:63-75)), recommends installing a specialized wall to intercept migrating groundwater pollution and removing contaminated surface soil, eliminating a major source of ongoing pollution of Plaintiffs’ groundwater. (App. 2: 72-73). This information was on file. It should have been considered and

³ Plaintiffs do not concede that demonstrating migrating pollution is legally necessary, as addressed below in Section II(B).

summary judgment was inappropriate. See *Hopkins v. Superior Metal Workings Systems, LLC*, 2009 MT 48, ¶¶ 12-14, 349 Mont. 292, 203 P.3d 803.

Plaintiffs further referred to publically available information—specifically, the Administrative Record from the EPA’s administrative site file. See Plaintiffs’ Opening Br. at 17 (citing Technical Impracticability Evaluation Rpt., located in the Administrative Record at 1211309–R8 SDMS, p. 6-3 (App. 1:3)).⁴

D. Whether Removing the Arsenic and Other Pollutants Would Benefit Plaintiffs.

ARCO argues repeatedly that cleaning up the Plaintiffs’ properties would be of no benefit to Plaintiffs. Why ARCO believes that there is no benefit in having tons of hazardous, poisonous, and carcinogenic arsenic removed from their properties is puzzling. At a minimum, a jury issue exists. ARCO cannot dispute that all of the Plaintiffs testified they want their property remediated. Pl.s’ Resp. to MSJ, Ex. 1 (CR 239).

⁴ ARCO also cites the Administrative Record in its Response Brief, stating that it is a “public document repository.” ARCO Br. at 5. ARCO contends that Plaintiffs should be aware of the public repository, and its existence demonstrates the Plaintiffs’ knowledge about the pollution on their properties. As noted in Plaintiff’s Opening brief, the same publicly available Administrative Record reinforces Plaintiffs’ expert’s opinion that the pollution is migrating.

E. Whether Plaintiffs Should Have Known That Their Properties Are Polluted.

On one hand, ARCO argues that Plaintiffs knew or should have known about the unsafe and polluted condition of their properties because of the publicity regarding the cleanup of the smelter and the surrounding areas. ARCO Resp. Br. at 3–7.

On the other hand, ARCO contends that Plaintiffs’ properties are not polluted at all. For example, ARCO’s expert Kathryn Johnson opines the smelter did not pollute Plaintiffs’ properties. Her report states most of the Plaintiffs’ properties contain arsenic levels within background concentrations. For those properties with arsenic above background levels, she contends the excess arsenic is attributable to the Plaintiffs’ own activities. ARCO’s Exp.Wit.Discl. at p. 13 (CR 215).

Further, while articles exist relating to remediation of the smelter, the Ponds, and residential areas outside of Opportunity and Crackerville, ARCO has consistently maintained that the community of Opportunity is clean. (App. 7:569; App. 9:624; App. 5:249-379). In fact, in 1996, ARCO represented that sampling was not even necessary in Opportunity. (App. 7:570-577). ARCO advised those few Opportunity citizens who received sampling results prior to the instant litigation that their properties had no problems from arsenic contamination. (App. 5:305-309).

F. Whether Arsenic Contamination is Self-Concealing.

ARCO argues that many of the Opportunity citizens saw smoke emanating from the stack. However, arsenic contamination in soil and groundwater cannot be detected by human senses. (App. 7:424); *see Bradley v. American Smelting and Refining Co.*, 104 Wash.2d 677, 709 P.2d 782 (Wash., 1985). ARCO makes no persuasive argument to the contrary. In fact, ARCO cites no fact demonstrating that the Plaintiffs were actually aware that arsenic or any other heavy metal had settled on their land. The Plaintiffs have never seen, tasted or smelled any arsenic on their properties. While ARCO contends that the contamination is not self-concealing, a jury certainly could find to the contrary.

II. ARCO's Misstatements of Law.

ARCO also misstates Montana law. Critical misapplications relied upon by ARCO to support the District Court's Order are discussed below.

A. CERCLA Does Not Prevent Plaintiffs From Remediating Their Own Properties.

ARCO argues that because Plaintiffs' properties are within a Superfund site, they have no right to remove contamination from their own properties, even if they have the financial means to do so. ARCO Br. at 36. Therefore, ARCO contends, abatement of its pollution is unreasonable.

ARCO cites to no authority holding a private landowner who recovers restoration damages is prevented by federal law from cleaning up his land. ARCO entirely ignores the savings provisions in CERCLA that preserve the right to bring state law claims. *See* 42 U.S.C. § 9652(d); 42 U.S.C. § 9614(a); and 42 U.S.C. § 9607(j).

ARCO improperly cites to an *Amicus Curiae* brief in support of its position. ARCO Br. at 36. This brief is not part of the record, as the District Court denied the motion for leave to file the *Amicus* brief. (CR 442).

Even more importantly, the arguments submitted by *Amicus* simply repeat the same meritless positions advanced by ARCO. *Amicus* incorrectly applies the law and mistakenly concludes that Plaintiffs have no right to remove carcinogens from their own properties.

While *Amicus* and ARCO argued that Section 113(h) and Section 122(e)(6) bar Plaintiffs' claim, they ignore Congress' precautions to ensure that state law claims, such as those filed by Plaintiffs here, would not be affected in any way by CERCLA. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 (1983). Congress contemplated private parties receiving funds from a polluter for restoration damages on a site regulated by CERCLA, and precluded a private individual from double recovery of the same costs through a CERCLA action. *See* 42 U.S.C. § 9614(b).

The Congressional Committee explained that the “[n]ew [CERCLA] section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants.” H.R. Conf. Rep. No. 99-962, at 224 (emphasis added) (Exh. 5 to Pls. MSJ re CERCLA (CR 239)). The Senate agreed to this Conference Report. *Bernice Samples v. Conoco, Inc.*, 165 F.Supp.2d 1303, 1312 (N.D. Florida, 2001) citing 132 CONG. REC. 28, 406, 28, 456 (1986)). Senator Stafford “who insisted upon stating expressly what all had agreed was their intent,” provided additional explanation of the “purpose and meaning” of the provisions in § 113:

The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and appropriate as defined under Section 121.⁵ In no case is State nuisance law, whether public or private nuisance, affected by 113(h).

Bernice Samples at 1312 9 (citing 132 CONG. REC. 28, 410) (emphasis added). Senator Mitchell echoed Senator Stafford, explaining that “[s]tate nuisance suits would, of course, be permitted at any time.” *Bernice Samples* at 1312 (citing 132 CONG. REC. at 28, 429).

⁵ This sentence applies to enforcement actions that require state government standards be incorporated and enforced by the EPA in the CERCLA clean-up and is not applicable here.

The argument that § 122(e)(6) bars Plaintiffs' claims is similarly flawed. Under § 122(e)(6), Congress forbade remedial actions by Potentially Responsible Parties (PRPs) that are inconsistent with the EPA's approved clean-up without EPA's approval. Section 122(e)(6) was passed "to avoid situations in which the PRP begins work at a site that prejudices or may be inconsistent with what the final remedy should be or exacerbates the problem." *Interfaith Comm. Org. v. Honeywell Intern, Inc.*, 2007 WL 576343 * 3 (quoting 132 CONG. REC. S14919 (daily ed. Oct. 3, 1986)). This section is part of CERCLA's overall objective to "promptly remediate polluted sites to bring land back to its original uncontaminated condition," and impose liability on "the parties responsible for the polluted condition of the land." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 273 (Wis. 2003).

In this case, because CERCLA does not preempt state law claims for trespass and nuisance, § 122(e)(6) cannot preclude Plaintiffs from recovering restoration damages. Further, Plaintiffs' restoration plan is not "inconsistent with" EPA's final remedy. Without some demonstration that Plaintiffs' restoration would interfere with CERCLA's objective to "bring the land back to its original uncontaminated condition," the "inconsistent response" action provision § 122(e)(6) is inapplicable.

Finally, even if § 122(e)(6) applied, which it does not, Plaintiffs, as private landowners, are not PRPs. The definition of PRP has an “innocent landowner” exception for landowners who were not responsible for polluting the subject property. *See* CERCLA §§ 107(b)(3), 101(35); *Westfarm Associates Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995). Further, CERCLA § 107(q) exempts landowners of “contiguous” property from the definition of PRP if the landowner did not cause, contribute or consent to the release of hazardous substances. Therefore, even if CERCLA applied, which it does not, the “innocent landowner” and “contiguous landowner” exceptions render § 122(e)(6) inapplicable.

ARCO cannot establish that abatement is unreasonable because it cannot be performed. In fact, ARCO’s interpretation of CERCLA runs afoul of numerous cases and the very text of CERCLA and Congressional intent.

B. *Burley* Does Not Require That Pollution Migrates.

ARCO’s Response is mistakenly premised on a fictional dispositive requirement in *Burley* that the pollution comprising a continuing nuisance must migrate. As discussed in Plaintiffs’ Opening brief, although this Court recognized the pollution at issue in *Burley* did migrate, the analysis of the continuing tort doctrine focused on whether the pollution was temporary or permanent. Ultimately, the *Burley* Court held a temporary nuisance or trespass constitutes a

continuing tort, and the ongoing presence of pollution is temporary when found to be reasonably abatable. *Burley*, ¶¶ 89-91.

ARCO gives short shrift to Plaintiffs' discussion, merely addressing *Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986) in a footnote. ARCO contends *Shors* does not involve environmental contamination, and therefore "continued migration did not factor into the analysis one way or the other." ARCO Br. at 26, fn. 4. However, the analysis in *Shors* regarding what constitutes a continuing nuisance was central to the logic and the holding of *Burley*. *Burley*, ¶¶ 69-70 (citations omitted). *Burley* concluded that whether the pollution continues to migrate is an important factor in the analysis (*Burley*, ¶ 73), but the analysis does not stop there. *Burley* continued to focus on abatability, ultimately concluding that a temporary nuisance or trespass constitutes a continuing tort, and the ongoing presence of pollution is temporary when reasonably abatable. *Burley*, ¶ 74-98. Whether the nuisance can be reasonably abated, not migration, determines whether the continuing tort theory applies.

C. ARCO's "Look-Back" Argument.

ARCO contends that summary judgment is appropriate on an additional ground – that damages are limited to the limitations period immediately preceding the filing of the complaint. ARCO Br. at 38. ARCO's argument should be rejected for two reasons. First, it is an end-run around established law concerning

restoration damages and the continuing tort doctrine. Second, the cases cited by ARCO are inapposite because they concern damage claims different from restoration damages.

This Court has previously stated that a plaintiff is entitled to restoration damages, even where the pollution ceased prior to the applicable statute of limitations period, where the pollution is reasonably abatable and thus constitutes a continuing tort. *Burley*, ¶¶87-89. In *Burley*, property owners in Livingston, Montana, filed claims in 2007, seeking restoration and other damages based on pollution placed on their properties prior to 1987. *Burley*, ¶¶ 5, 8. Because the railroad was responsible for a continuing and temporary nuisance, it can be required to abate the nuisance through restoration damages. *Burley*, ¶¶87-89.

In this case, the contamination at issue is reasonably abatable. Because the nuisance is continuing, damages sufficient to trigger restoration damages occur each day that the pollution is not removed. ARCO may not avoid restoration damages.

The cases cited by ARCO do not involve claims for restoration damages and are inapposite. In *Walton v. Bozeman*, Walton sought compensation for the costs associated with unplugging a diversion box installed by the City and the loss of value of his hay crop as well as prospective damages likely to be incurred until the city abates the continuing nuisance. 351, 353-354, 588 P.2d 518, 520 (1978). There

was no claim for restoration damages. *Walton*, 353-354. While the Court determined the nuisance was temporary and constituted a continuing tort because, at all times, the City could have abated the nuisance by taking curative action, because *Walton* does not involve a claim for restoration damages, *Walton* does not stand for the premise proffered by ARCO.

The remaining cases cited by ARCO similarly do not involve claims for restoration damages. *See Laham v. Rocky Mountain Phosphate Co.*, 161 Mont. 28, 504 P.2d 271 (1972) (Action to recover damages for injury to plaintiffs' person and property and for loss of profits to their business caused by smoke and fluoride effluents from phosphate manufacturing company); *Nelson v. C&C Plywood Corp.*, 154 Mont. 414, 465 P.2d 314 (1970) (Action to recover costs for repairing or replacing the fixtures, appliances, water supply and dwelling damaged by glue waste); *Shors*, 221 Mont. 390 (Action against subdivider for defamation and breach of easement rights).

ARCO also cites extra-jurisdictional cases which do not stand for the premise proffered. In *Burlington Northern Santa Fe Ry. Co. v. Grant*, BNSF sought to recover \$469,000 that it expended removing, disposing and stopping migration of tar-like materials ("TLM") onto its property. 505 F3d. 1013, 1018 (10th Cir. 2007). *Grant* does not involve a claim restoration damages by a private, individual landowner with personal reasons to restore her property. In fact, BNSF

was not entitled to restoration damages beyond the diminution of property value under Oklahoma law. In *Grant*, it was proper to limit recovery to those costs actually incurred during the statute of limitations period. BNSF should have filed an action within two years of initiating its own efforts to remove the TLM – a luxury BNSF had the financial wherewithal to do.

Grant is remarkable, however, because the court determined that the statute of limitations had not run even though BNSF undisputedly knew about the TLM, having taken action to remove it. *Grant*, 505 F3d. at 1027 (citing *Moneypenney v. Dawson*, 141 P.3d 549, 553 (Okla.2006)).

Bradley v. ASARCO is also distinguishable because the plaintiff did not seek restoration damages. 709 P.2d 782, 785 (Wash. 1985). In fact, the plaintiff stipulated that no actual damages exist. *Bradley*, 709 P.2d at 785. Instead the plaintiff sought “nominal and punitive” damages for the invasion by ASARCO onto the plaintiff’s property by releasing arsenic and cadmium into the air when ASARCO knew that those effluents would be blown onto the plaintiff’s property. *Bradley*, 709 P.2d at 784-85; 791-92. The issue of restoration damages was not addressed. Nevertheless, *Bradley* was cited with approval in *Burley* because the *Bradley* court determined that a continuing trespass or nuisance repeats each day until the refinery removes the offensive substance from the plaintiff’s property. *Burley*, ¶ 63 (citing *Bradley*, 709 P.2d at 791).

While ARCO's "look-back" argument relies upon irrelevant case law, it also contravenes the public policy of Montana regarding compensatory damages. Compensatory damages must compensate the injured party for actual loss or injury—no more, no less. *Burk Ranches Inc. v. State*, 242 Mont. 300, 307, 790 P.2d 443, 447 (1990). In *Sunburst*, Texaco had ceased operations contributing to the contamination in 1961. The plaintiffs brought suit in 2001. The Montana Supreme Court held, even though Texaco had not contributed to the pollution since 1961:

If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.

Sunburst, ¶ 34.

To evade restoration damages where a continuing nuisance exists would certainly contravene the holdings in both *Sunburst* and *Burley*. The plaintiff would not be compensated at all for the contamination of their property, and the defendant would receive windfall benefit.

D. The Continuing Tort Doctrine Applies to All of Plaintiffs' Claims.

ARCO argues that the continuing tort doctrine only applies to Plaintiffs' trespass and nuisance claims. ARCO Br. at 24. ARCO fundamentally misstates Montana law on the continuing tort doctrine. ARCO relies heavily on *Gomez v.*

State, 1999 MT 67, ¶ 25, 293 Mont. 531, 975 P.2d 1258. The inapplicability of *Gomez* is addressed on pages 38-39 of Plaintiffs' Opening Appellate brief.

ARCO also cites *Church v. Gen. Elec. Co.*, 138 F. Supp. 2d 169 (D. Mass. 2001). *Church* is inapplicable and distinguishable. For example, Church brought his claim under a unique Massachusetts statute providing for "contribution, reimbursement, or an equitable share of the costs of a response action to remediate contamination." *Church*, 138 F. Supp. 2d at 174. The plaintiff "never expressed any intent to spend any money to remediate their lands." *Church*, 138 F. Supp. 2d at 175. ARCO also cites *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946 (9th Cir. 2013). The language relied upon by ARCO in *Chubb* is entirely dependent on a citation to *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125 (Cal.1991). However, in *Mangini*, the plaintiff did not argue that the continuing tort doctrine should apply to his negligence per se and strict liability claims. Instead, he argued that the claims did not accrue until he tried to sell his property, and the defendant's misrepresentations tolled the statute pursuant to the discovery doctrine (a claim found to be factually inaccurate by the court). *Mangini*, 230 Cal. App.3d at 1149-1153.

Simply, *Gomez*, *Church* and *Chubb* provide no logical reason to expel the continuing tort doctrine from Montana claims arising under strict liability,

wrongful occupation and unjust enrichment, where those claims are intertwined with trespass and nuisance claims – as is the case here.

CONCLUSION

For the reasons set forth above and in the Opening Brief, Appellants request this Court reverse and remand this case to District Court.

DATED, this 18th day of September 2014.

SUBMITTED BY:




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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief is proportionately spaced in 14-point roman, non-script text and contains 4,740 words excluding brief's cover, table of contents, table of authorities, certificate of compliance and certificate of service.

DATED, this 18th day of September, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing Appellants' Reply Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each of the following parties:

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